USDA United States Department of Agriculture | Forest Service | Bighorn National Forest | 2013 Eastside 2nd Street
Sheridan, WY 82801-9638
307-674-2600
TDD 307-674-2604

File Code: 1570
Date: December 16, 2011

Jonathan Ratner
Director - Wyoming Office
Western Watersheds Project
P.O. Box 1160
Pinedale, WY 82941

Dear Mr. Ratner:

You filed a notice of appeal on behalf of Western Watersheds Project, challenging District Ranger Mark Booth's decision on sheep and goat livestock grazing allotments administered by the Powder River Ranger District on the Tensleep project area. This is one of five decisions discussed in the Final Environmental Impact Statement (FEIS) for Livestock Grazing and Vegetation Management, (known as the Big 6 decisions) and one of five decisions addressed in your appeal. District Ranger Booth signed the Record of Decision (ROD) on July 26, 2011.

The appeal period ended November 3, 2011. You sent your appeal electronically with a number of emails and attachments beginning on November 3, 2011. The appeal itself was in the last file which did not arrive until 12:26 am on November 4, 2011, thus, your appeal was not timely filed. I am accepting your appeal this time because the early emails were timely, the appeal document was only 26 minutes late and there was no prejudice to our processing of the appeal. However, I admonish you that it is your obligation under the statute and regulation to ensure timely receipt by the Forest Service of your appeal and any late submissions in the future will not be accepted.

I have reviewed the appeal record, including your appeal, the ROD, and supporting documentation in the project record. I have weighed the recommendation from the Appeal Reviewing Officer and incorporated it into this decision. A copy of the Appeal Reviewing Officer's recommendation is enclosed. This letter constitutes my decision on your appeal including the specific relief requested.

Action Appealed
District Ranger Booth's decision was to select Alternative 3, continuation of permitted livestock grazing on seven allotments using adaptive management strategies.

You requested relief by asking the Forest Service to:

- Withdraw the decision, with any subsequent decision complying with CEQ NEPA regulations.
- Work with appellants to redesign the project to reduce impacts, create additional monitoring, and protect sensitive species and their habitats.
- Develop and fund additional monitoring requirements.

- Perform additional consultation with experts from the Rocky Mountain Research Station, Regional Office and other institutions in developing design criteria.

Appeal Reviewing Officer's Findings and Recommendation
Appeal Reviewing Officer (ARO) Rhonda O'Byrne found that your appeal covered many different aspects of the analysis, including (but not limited to), sensitive species and wildlife viability, compliance with the Bighorn Forest Plan and the sensitive species policy, livestock grazing analysis, watershed conservation practices, use of best available science, forage use, range improvements, adaptive management, and compliance with the Clean Water Act. The ARO identified the appeal issues and assembled a team to respond to each of these. These points and responses are articulated in the attached letter from the ARO.

Decision
From the information provided in the project record, the FEIS and ROD, I find that the District Ranger reasonably decided not to include the full suite of design criteria for bighorn sheep in his decision. The risk assessment and Ranger Booth's ROD both document there have been no documented occurrences of bighorn sheep in the vicinity of the seven allotments in the Tensleep project area. District Ranger Booth made it clear if documented occurrences of bighorn sheep occur in the future, the design criteria and adaptive management would be followed. Also, his decision would be reviewed to determine if management of the allotments should change. The District Ranger's decisions are expressly laid out and the ARO reviewed and concurred with the logic offered in the record aimed at balancing the overall multiple use objectives. I want it to be clear that design criteria and adaptive strategies are actions adopted as part of the District Ranger's Record of Decision. The implementation of these actions are documented in AOIs and/or AMPs, as warranted, and as such become a part of the term grazing permit.

After reviewing the appeal record, I agree with ARO O'Byrne's analysis as presented in the recommendation letter. I find no violation of law, regulation, or policy. Therefore, I have decided to affirm in whole the Ranger's decision, denying your request for relief.

This decision constitutes the final administrative determination of the Department of Agriculture (36 CFR 215.18(c)).

Sincerely,

/s/ William T. Bass
WILLIAM T. BASS
Appeal Deciding Officer
Forest Supervisor

Enclosure

cc: Mark D Booth
John Rupe
Rhonda L OByrne

United States Department of Agriculture | Forest Service | Black Hills National Forest | Northern Hills Ranger District
2014 North Main Street
Spearfish, SD 57783-2917
605-642-4622

File Code: 1570-1 **Date:** December 16, 2011
Route To:

Subject: Recommendation Memorandum Letter for Appeal #2012-02-02-0003 for Sheep and Goat Livestock Grazing on the Tensleep Project Area on the Powder River Ranger District

To: Bill Bass, Appeal Deciding Officer

I have reviewed the notice of appeal dated November 4, 2011 of (#2012-02-02-0003) of Mark D. Booth, District Ranger, Powder River Ranger District, Big Horn National Forest decision concerning Sheep and Goat Livestock Grazing on the Tensleep Project Area. The appeal was submitted by Jonathan B. Ratner on behalf of Western Watershed Project. My review was based upon the materials available to the District Ranger in the administrative record. Pursuant to 36 CFR 215.13 (f) (2), this will constitute my written recommendation concerning the disposition of the appeal. I will forward the appeal record to you.

BACKGROUND

On July 26, 2011 District Ranger Mark D. Booth signed the decision for Sheep and Goat Livestock Grazing on the Tensleep Project Area. This was one of five separate decisions made resulting from the Final Environmental Impact Statement for Livestock Grazing and Vegetation Management on 5 Project Areas on the Tongue, Medicine Wheel/Paintrock, and Powder River Ranger Districts. The decision was to select Alternative 3, which authorized continued permitted livestock grazing on the Baby Wagon, Garnet, Hazelton, Leigh Creek, McLain Lake, Upper Meadows and Willow sheep and goat allotments using adaptive management strategies.

RELIEF REQUESTED

The appellant requests that ROD be withdrawn, as it is not based on high quality information and analysis, is not well-informed, and clearly errs in its assumptions and analyses. If the Forest chooses to issue a new decision, they must first be instructed to conduct NEPA in accordance with CEQ NEPA regulations 40 CFR 1502.9 and prepare a thorough, rigorous, accurate, non-arbitrary analysis and assessment of impacts.

Further, they request the following relief:

1. That the Forest makes good faith efforts to work with appellants to redesign the project to reduce environmental impact, create a defensible monitoring plan and take measures to adequately protect Sensitive Species and the habitats on which they depend
2. That the Forest develop a defensible monitoring plan for the project area that is fully funded
3. That experts from the RMRS, the Regional Office and other institutions be utilized in the design criteria needed to fully protect Sensitive Species and their habitats.

ISSUES, DISCUSSION AND CONCLUSIONS

APPEAL ISSUE I: THE ENVIRONMENTAL IMPACT STATEMENT (EIS) AND RECORD OF DECISIONS (RODs) VIOLATES NATIONAL FOREST MANAGEMENT ACT (NFMA), AND NATIONAL ENVIRONMENTAL POLICY ACT (NEPA).

A) The RODs failed to adequately implement design criteria and mitigation to protect sensitive species and insure viability. Appellant contends that the Forest Service violated NFMA and NEPA by failing to comply with sensitive species policy by not adequately implementing design criteria and mitigation to protect sensitive species and insure viability, and failing to comply with Forest Plan requirements.

Discussion: It is important to clarify that the "objectives required by the sensitive species policy are "objectives for managing populations and/or habitat" and are not "recovery objectives" which are only required for federally listed species under the Endangered Species Act. A Biological Evaluation (BE) is used to analyze the effects of Forest Service actions on Sensitive Species. The purpose of this analysis for Sensitive Species is to determine whether the action will contribute toward federal listing or loss of viability in the Planning Area (FSM 2672.41).

While the appellant made some very general allegations regarding failure of the RODs to adequately implement design criteria and mitigation to protect sensitive species, the only specific information provided pertains to the northern leopard frog, water vole and bighorn sheep. Unfortunately, the appellant did not raise concerns regarding northern leopard frog and water vole at a time when they could have been meaningfully addressed (e.g. scoping or formal comment period on the Draft EIS). Based on a review of the project record, the ROD, FEIS, Biological Evaluations and wildlife specialist report describe all applicable Forest Plan Standards and Guidelines that would be implemented for sensitive species as part of the decision. The FEIS and BE determined that livestock grazing conducted within standards and guidelines should provide adequate habitat for sensitive species (EIS Table 3-29). The FEIS describes design criteria, consistent with Forest Plan direction that would be implemented to protect and maintain habitat for sensitive species. Forest Plan direction which is incorporated by reference into the FEIS provides quantifiable objectives. The "planning area" for a Forest Plan is defined as the area of the National Forest System covered by a ... forest plan. Therefore, development of management objectives for sensitive species and MIS occurs at the Forest scale rather than at the scale of an individual project. The BE for bighorn sheep and the BE for all other Sensitive Species determined that the proposed action would not cause a trend towards Federal listing or loss of viability in the planning area for any of the Sensitive Species. Given this determination, the Forest Service was not required to develop specific conservation strategies for sensitive species as Appellant alleges (FSM 2670.45). See response to Appeal Issue I.C for further discussion of viability analysis for sensitive species.

FSM 2670.45
The FEIS incorporated Forest Plan standards and guidelines, FS policy and direction, and applicable laws (FEIS Chapter 1, pages 1-10 – 1-14; FEIS Chapter 2, pages 2-3) into the development of the Purpose and Need for Action and Alternatives, including the Proposed Action. The ROD (pages 18-22) further discuss compliance with the relevant laws and Forest Plan direction. In addition, the FEIS and RODs confirm consideration and compliance with the

Endangered Species Act (ESA). Lastly, the Wildlife BE prepared in support of the FEIS addressed threatened, endangered, candidate and proposed species (pages 6 – 9).

FSM 2622.01
The BE produced for bighorn sheep and the BE produced for all other Sensitive Species in support of the FEIS provides analysis of all relevant Sensitive Species and Management Indicator Species (MIS). The Wildlife BE provides a complete list of Forest Service Region 2 Sensitive Species occurrences and habitat within the Big 6 AMP project area (Table 4, pages 11 – 18).

Northern leopard frog
The Final Environmental Impact Statement (FEIS) (Table 3-29), describes Forest Plan standards and guidelines that would be implemented to provide adequate habitat to maintain population viability for this species. The appellant alleges that the Forest Service ignored its own conservation assessment and failed to ensure adequate protection of the frog and its habitat, in part by allowing grazing within 200 meters of occupied or potential breeding ponds, and cites Smith (2003) which is a conservation assessment that was prepared for the Black Hills National Forest. The BE references the 2007 northern leopard frog technical conservation assessment prepared for Region 2 (http://www.fs.fed.us/r2/projects/scp/assessments/northernleopardfrog.pdf) and considers the information in the assessment (Table 4, page 11). The FEIS (page 2-54) describes design criteria 3, 10, and 12 that are applicable to northern leopard frog and its habitat.

Water vole
Based on information found in the project record (FEIS Table 3-29; Biological Evaluation pages 22 – 24), livestock grazing conducted within Forest Plan standards and guidelines is estimated to provide adequate habitat to support viable populations for this species consistent with the Forest Plan FEIS and its associated species assessment for water vole. The Forest Plan Revision species assessment for water vole describes conservation measures to protect and maintain habitat (page 4), which are incorporated into the FEIS and Wildlife BE by reference. With regard to water vole, the Wildlife BE states:

> "The determination for this project, with all three alternatives (given cumulative effects) is **may adversely impact individuals or habitat, but is not likely to result in a loss of viability of populations on the Forest, nor cause a trend to federal listing, or a loss of species viability range wide** on water voles or their habitat. This determination is consistent with the anticipated effects as analyzed in the Forest Plan FEIS and associated assessments." (Wildlife BE Page 23).

Specifically, the following conservation measure from the Forest Plan water vole species assessment addresses habitat and vegetation cover requirements:

> "Manage livestock and ungulate grazing/browsing such that potential habitat is improved or maintained, particularly during drought years. Potential habitat should be defined by riparian potential vegetation community classification (Girard, 1997), in conjunction with Rosgen stream classification. Streambank stability, soil compaction, and vegetative cover in riparian areas are the primary emphasis factors. Consider exclosures where

necessary. Incorporate some areas of no livestock grazing in suitable habitat to maximize potential for voles. Delay turn-out of livestock until adequate soil drying has occurred to prevent compaction."

Bighorn Sheep

The key issue addressed was the likelihood of disease transmission between domestic and bighorn sheep. The scientific literature indicates that physical or temporal separation is the best way to reduce disease transmission.[1]

A risk Assessment was prepared for this project to assess the risk of contact between domestic sheep and Bighorn sheep. The Risk Assessment is also a supplemental analysis for the Biological Evaluation (BE) prepared for the Big 6 Project (Risk Assessment, pg 1). One of purposes of this assessment was to develop design criteria to address this potential contact. As described in the Risk Assessment (pg 3):

> *"design criteria were assessed for applicability of local conditions for effectiveness of reducing the potential for contact between bighorn and domestic sheep in the areas where Big 6 domestic sheep grazed or trailed and on potential bighorn sheep habitat on the Bighorn NF outside the Big 6. Several iterations of this process occurred with design criteria added and strengthened in order to improve the effectiveness and likelihood of maintaining separation between bighorn and domestic sheep."*

The risk assessment stated that there are no bighorn sheep herds in the vicinity of the domestic sheep allotments on the Powder River District (pg. 1). There are; however, specific design criteria and adaptive management strategies included in the Decision to address concerns for Bighorn sheep:

- When bighorn sheep are in visible proximity to, or are known to come in contact with, domestic sheep, the permittee or Forest Service personnel shall immediately notify the WGFD with the location and description of the bighorn sheep. The Forest Service and WGFD will cooperatively re-establish effective separation.
- If permittee notification to USFS or WGFD of bighorn sheep near domestic sheep is delayed due to lack of communication options, permittee(s) will utilize SPOT GPS devices or other technology to improve notification, which can be provided by entities other than the permittee(s). It is noted that herders on the Big 6 allotments currently utilize cell phones for contact with permittee(s).

---

[1] As evidenced throughout the record, one of the central management concerns for bighorn sheep is preventing disease transmission from domestic sheep. Complicating the Forest Service's ability to manage for this concern is the fact that the various states have management authority regarding wildlife on National Forests. In Wyoming, the Forest Service and the State have engaged in a long and healthy conversation about this issue. Wyoming formed the Wyoming State-wide Bighorn/Domestic Sheep Interaction Working Group and decided state-wide which areas should emphasize wild sheep and which areas should emphasize domestic sheep. That was a reasonable way for the State to address the primary issue for disease transmission: separation. As a result of the State process, Wyoming decided the Bighorn National Forest is a "non-emphasis area" for bighorn sheep with regard to allocating state resources. However, the Forest Service must manage habitat to support diverse wildlife populations on each National Forest unit. While the Forest Service participated in the state working group, it did not sign the report because of the differing management authorities.

The State did designate the Devil Canyon herd as a "cooperative review" herd, which occurs largely on BLM lands adjacent to the Bighorn National Forest. Given that the State has decided not to emphasize wild sheep on the Bighorn National Forest, the Ranger reasonably decided to focus management actions to insure separation between domestic and bighorn sheep on the Devil Canyon herd. However, management actions have been identified to address the Shell Canyon herd as well. These focus on preventing bighorn sheep associated with this herd, which is considered diseased, from contacting the Devil's Canyon herd. They also address taking another look at management actions if there are changed conditions in the future, such as extirpation of the Shell Canyon herd, that would necessitate a need to address separation between domestic and bighorn sheep. As a result, the Forest Service focused its immediate management actions on the Devil Canyon herd to meet its obligations under the Sensitive Species policy and the Forest Plan.

Refer to the Risk Assessment for a full discussion of all design criteria that were developed and incorporated or dismissed for consideration for this project (Appendix A, pgs. 55-68).

Fails to Provide Supporting Rationale as to Effectiveness
The appellant states:

> "...the EIS and ROD's implement measures supposedly to protect various resources but fails to provide any supporting rationale as to effectiveness. "Mitigation must be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated." "A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA." Failure to demonstrate the effectiveness of mitigation measures does not satisfy the intent of NEPA. The Forest Service is obligated to prove that mitigation will in fact be effective. The NEPA document must analyze mitigation measures in detail and explain the effectiveness of such measures. In the case of the FEIS and ROD's, the mitigation measures are discussed but effectiveness is not."

In contrast to what the appellants allege, the ROD (p. 5) FEIS (Chapter 2, page 2-53) and the bighorn sheep risk assessment (pages 13-19) implement design criteria and tiers to Forest Plan direction to protect Sensitive Species and maintain viability and habitat. Implementation and effectiveness monitoring were identified to ensure management, including design criteria, are effective. Refer to discussion below under Appeal Issue I.C regarding design criteria and monitoring.

The MIS section fails to comply with the extensive case law regarding management and analysis of MIS species
The appellant alleges that:

> "MIS species are not dealt with in accordance with regulation. In order to sufficiently analyze and assess impacts to management indicator species, the Forest must gather and utilize quantitative population trend data."

Additionally, the appellant alleges that the Forest Service continues to rely on measures of habitat and/or inadequate population trend data, as a proxy for actual trend data.

Detailed analyses of habitat conditions and population data for each MIS species are provided in the MIS section of Wildlife Specialist Report (Wildlife Specialist Report, pages 12 – 19), and the Forest Plan FEIS (MIS section, Chapter 3). The analysis describes current populations, habitat trends, and identifies data sources and inventory methods used. Information found in the Wildlife Specialist Report supports that the Forest gathered and utilized quantitative population trend data, and discussed quantitative population trend information at Forest and state-wide scales. The analysis also describes potentially suitable habitat in the planning area, and analyzed direct, indirect, and cumulative effects discussing anticipated effects to habitat comparing existing habitat conditions (no action alternative) with conditions expected under each action alternative. Design criteria include applicable Forest Plan Standards and Guidelines, and adaptive management strategies (Wildlife Specialist Report prepared in support of the Big 6 FEIS, pages 4 – 6). These were accounted for in determining effects from the project and the relationship to Forest-level viability requirements for MIS species. The appellant cites 36 CFR

219.19 and CFR 219.26 (including requirement of "quantitative" population data). These are not applicable to this project because the 1982 rule was the source for the MIS requirements and that rule is no longer in effect. Interim guidance requires consideration of Best Available Science and compliance with Forest Plan direction. The record shows that Best Available Science regarding MIS was considered and the Forest Plan was complied with (BE pgs. 22-32, FEIS pg.3-156 and ROD pg 21-22).

Fails to provide information about current productivity in comparison with capable acres
The appellant alleges that the NEPA document fails to provide any information regarding current productivity as required by NFMA in comparison with capable acres. The appellant also requests spatial display of the pattern of capable acres. Unfortunately, the appellant did not raise this concern at a time when they could have been meaningfully addressed (e.g. scoping or formal comment period on the Draft EIS).

The requirement to conduct capability analysis occurs at the Forest planning level. There is no mandate to conduct capability analysis at the project level. Review of the project record shows that suitability, productivity, and utilization maps were prepared that identify areas suitable for grazing. Review of the FEIS shows that the proposed action implements measures to achieve the desired condition that "Permitted stocking is consistent with the capability of the allotment" or "Permitted stocking is consistent with the capability of the allotment and upland and riparian allowable use guidelines are consistently met (minimum 4 out of every 5 years)" (FEIS Chapter 2, table 2-4). In addition, as stated in the FEIS:

> "...rangeland suitability and capability, as determined during the programmatic, forest plan level analysis, are discussed in appendix B of the FEIS for the forest plan (USDA Forest Service 2005a)." (Big 6 FEIS Chapter 1, page 1-12)

The FEIS provides additional information on suitability and capability, stating:

> "For this analysis, the forest plan rangeland suitability determination was compared to current and more site-specific range analysis information. The resulting allotment-specific rangeland suitability analysis was used to help determine the appropriate level of livestock grazing and management. Key management factors including timing, intensity, duration, frequency, opportunity, and management effectiveness are also used to determine the appropriate livestock grazing levels." (Big 6 FEIS Chapter 1, page 1-14)

Refer to Appeal Point II.D for more information on this, including specific examples.

Conclusion: Based upon my review of the project record, I find that the FEIS and ROD adequately addresses design criteria and mitigation to protect sensitive species and insure viability. I also determined there was no violation of law, regulation, or policy, and recommend the District Ranger's decision be affirmed on this issue.

B) Appellant provided 23 separate attachments highlighting items for which the appellant claims the RODs failed to comply and the EIS failed to provide discussion or evidence that they were complied with.

Discussion: 36 CFR 215.14(a) places the burden on the Appellant to provide specific project or activity specific evidence and rationale focusing on the decision, to show why the decision should be reversed. I reviewed each of the attachments to the appeal and found there was no specific evidence or rationale as to how the EIS or ROD did not comply with the highlighted sections. In reviewing the attachments, most were reiterations of Forest Service policy documents. Most, if not all of these, were included in the appeal and addressed throughout this memorandum.

One document reviewed (*Water Vole (Microtus richardsoni): A Technical Conservation Assessment)* was not specific agency policy considered elsewhere in this memorandum. The specific highlighted sections were statements, but no evidence or rationale was provided as to how the EIS or ROD did not consider them (e.g. Water voles have high ecological vulnerability because specific habitat requirements limit their abundance and distribution along a stream, within a watershed, and between adjacent watersheds.). The Appellant, therefore, has not met his burden under 36 CFR 215.14 (a).

Conclusion: Based on the above discussion, I decline to address the highlighted sections in the attachments the appellant provided as appeal points because, as presented, they do not provide sufficient information for the ADO to render a decision and are not in compliance with the appeal content requirements of the regulations.

The appellant states that no examination of Forest Plan consistency to the project level decision has taken place in the ROD's or FEIS.

Discussion: Documentation in the each of the five RODs and the FEIS shows numerous discussions examining Forest Plan consistency with the project level decisions. In the RODs, for example, design criteria reference specific applicable Forest Plan standards and guidelines, the decision rationale discusses how the proposed action best meets Forest Plan objectives over the other alternatives, and there is a detailed examination of Forest Plan consistency within the NFMA law section. In the FEIS, as well, numerous topics incorporate references, discussions, and analysis of Forest Plan consistency including desired conditions (Chapter 1), management direction and related policies and guidance (Chapter 1), key issues (Chapter 1), design criteria (Chapter 2), comparison of alternatives (Chapter 2), and the effects analysis by resource area (Chapter 3).

Conclusion: Based upon my review of the project record, I find that the FEIS and ROD did examine in detail Forest Plan consistency to the project level decision. I also determined there was no violation of law, regulation, or policy, and recommend the District Ranger's decision be affirmed on this issue.

The appellant contends that Forest Plan direction was largely ignored, specifically.

- *Rangeland Vegetation Guidelines (1, 2, 3, 4, 6, 10, 11)*
- *Rangeland Improvement and Maintenance Guideline (6)*
- *Lynx linkage areas Standard (2)*
- *Non-native and invasive species Standard (1)*

- *Management area direction (2.2, 3.5, 5.4, 5.51)*
- *Watershed Conservation Practices Handbook, FSH 2509.25-05 and Guidelines (12.1H, 12.1K, 12.1L, 12.4C, 12.4E, 14.2a)*
- *Soil Management Handbook FSH 2509.18*

Discussion:

- Rangeland vegetation guideline 1 is well developed in the desired condition discussions found in the FEIS (Chapter 1) as well as the FEIS Appendix B Proposed Actions by Area/Allotment. Where applicable, guideline 2 is implied in the design criteria and in the FEIS Appendix B Proposed Actions by Area/Allotment developed to meet or move toward desired conditions. Guideline 3 is found in the FEIS Appendix B Proposed Actions by Area/Allotment as examples of how stocking adjustments, rest/rotations, and timing of use may be made depending on meeting or moving toward desired conditions. Guideline 4 can be found in design criteria #6 in the RODs and the FEIS (Chapter 2). Guidelines 6 and 10 are largely incorporated into the design criteria (#3 and #18) listed in the RODs and the FEIS (Chapter 2). Guideline 11 is discussed in the RODs in the "Elements of the Decision by Allotment" table as to which vacant allotments will or will not be designated as forage reserve allotments.
- Rangeland improvement and maintenance guideline 6 is incorporated by reference, if applicable (FEIS Design Criteria).
- Although the appellant claims the lynx linkage area standard 2 was ignored, they did not bring this concern forward in the comments on the DEIS. However, as stated in the Forest Plan p. 1-40: "If the Bighorn NF is determined to be occupied habitat per the 2005 Lynx Conservation Agreement, management direction from the Revised Plan will be implemented..." Under the RODs summary determinations for ESA compliance regarding Canada lynx, the U.S. Fish and Wildlife Service considers the forest as unoccupied by Canada lynx, and there are no known occurrences within the project area. The FEIS Chapter 3 Table 3-28 states "The Northern Rockies Lynx Amendment lists the forest as "unoccupied" and therefore management direction in the Forest Plan from this amendment remains idle until such time as the forest is occupied by lynx." Therefore, the Forest Service response was appropriate.
- Non-native and invasive species standard 1 is demonstrated in design criteria #11 and WCPH 11.2b found in the RODs and FEIS (Chapter 2). Discussions and analysis related to non-native and invasive species are also found in the FEIS Chapter 1 (Management Direction and Related Policies and Guidance, and Table 1 Issue 8); Chapter 2 (monitoring for Alternative 3); and Chapter 3 (effects and analysis for Invasive and Noxious Weeds). Finally, the Invasive Plant Species Specialist Report provides an in-depth discussion regarding the legal framework, Forest Plan guidelines and monitoring recommendations.
- Appellant expresses concern that management area direction is ignored because no difference in management is applied to the MAs with a wildlife or plant emphasis which covers a quarter of the project area. The RODs state the difference between existing condition and desired condition can create the need for action. Some areas are not meeting desired conditions, therefore creating a need for a management change summarized in the FEIS Chapter 2, Table 2-3 (administrative actions), and Table 2-4 (need for change and proposed action table). More detailed discussions are in Appendix B. The RODs under NFMA/Forest Plan Consistency also state that planned activities are consistent with management area

direction. In addition, management area direction is discussed in the FEIS Chapter 1 (Management Direction and Related Policies and Guidance) and in various resource specialist reports. The Wildlife report analyzes the effects of the project on wildlife habitat for multiple species and determined overall "The alternatives are also consistent with the desired conditions for wildlife habitat specific to the management area prescription land allocations and it conforms to the desired wildlife habitat conditions identified for the project area."

- Per appellant: "It is unclear the extent to which the USFS has conducted and/or will conduct baseline stream health surveys within the allotments. According to the USFS's Watershed Conservation Practices Handbook (WCPH), FSH 2509.25, management actions must be undertaken so that "stream patterns, geometry, and habitats are maintained, or improved toward robust stream health." The Forest Plan requires that the USFS "[m]aintain or improve long-term stream health. . . ." The WCPH at FSH 2509.25-05 defines stream health as, "The condition of a stream versus reference conditions for the stream type and geology, using metrics such as channel geometry, large woody debris."

  Per the Forest Plan Soil, Water, Riparian, and Wetland guideline 1: "Incorporate appropriate practices and design criteria from the WCPH into all project design, analysis, and decision documents. WCPH FSH 2509.25 zero code states: "The management measures are environmental goals to be attained using one or more design criteria (EPA, 2005)."

  According to FEIS Appendix C, in some cases, WCPH design criteria are either not applicable, the Forest Plan has other direction, or the project level NEPA decision includes other site-specific direction. Additional design criteria are provided in the FEIS (Chapter 2). The design criteria in Chapter 2 are not specific to WCPH guidance but may provide additional protection for soil and aquatic resources.

  The appellant referenced FSH 2509.25-10, 12.3 - Management Measure (5): "Conduct actions so that stream pattern, geometry, and habitats maintain or improve long-term stream health." Design criteria related to this management measure are related to adding/removing material in streams or lakes and relocating stream channels. The Forest Service did not adopt this management measure/design criteria because the project is not proposing to add materials to channels or lake and no stream channel will be relocated.

  The ROD decision rationales list WCPH design criteria to be implemented and monitored under each decision. In addition, three grazing pastures on the forest receive a best management practice (BMP) review annually, which provides a format for permittees, range managers, and soil/water resource specialists to review the effectiveness of the BMPs and the effect of livestock grazing on the soil and water resource. This includes information related to stream health. The Hydrology, Soils, and Fisheries Specialist Report discusses all long-term stream monitoring locations by area and creek, including actual BMP review data sheets.

Appellant specifically references Watershed Conservation Practices Handbook Guidelines 12.1H, 12.1K, 12.1L, 12.4C, 12.4E, 14.2a as failing to comply with WCPH requirements.

- 12.1H: Appellant: "the current grazing standards adopted in the proposed action do not

include anything to replace Kentucky bluegrass with native deeply rooted species."
    - The design criteria states: "Manage dry meadow and upland plant communities, including Kentucky bluegrass types, that have invaded into wetland/riparian areas in a *manner that will contribute to their replacement over time* by more mesic native plant communities to the extent practicable. Develop site-specific riparian stubble height standards or use the following default levels". The Forest Service has adopted grazing standards as design criteria to address this management measure.
- 12.1K: Appellant: "the Forest assumes that meeting the minimal stubble height requirements will somehow maintain stable banks but have provided no information or research to support this claim. No data is provided as to current conditions."
    - The Hydrology, Soils, and Fisheries Specialist Report specifically cites literature that supports stubble height to protect streambanks, and provides site specific monitoring information.
- 12.1L: Appellant: "we are expected to believe that a photo will be able to determine soil compaction. This is clearly an inappropriate monitoring strategy to determine soil compaction."
    - Per FEIS Appendix C, photopoint monitoring as well as site visits (BMP Reviews) will be done to determine if soil resources are deteriorating as evidenced by hummocking or platy surface structure. Examples of actual BMP Review Forms in the Hydrology, Soils, and Fisheries Specialist Report show soil compaction is specifically addressed by the ID team.
- 12.4C: Appellant: "the Forest fails to deal with ground cover in uplands which clearly effect riparian areas. In many areas of the allotment in question livestock grazing has severely impacted groundcover and soils leading to greater runoff as the photos provided clearly show."
    - It is unclear as to what allotment and what photo the appellant is referring to, but in the FEIS Appendix C the Forest Service determined that no long-term reduction in organic ground cover or organic soils related to wetlands will occur under proposed action.
- 12.4E: Appellant: "we are expected to believe that no impacts will occur to marshy or spring areas even though these are the area's most vulnerable to livestock grazing and to which livestock are most attracted."
    - FEIS Appendix C, the Forest Service determined that the loss of fens or springs is not expected to occur through livestock grazing under this decision
- 14.2A: Appellant: "this clearly would be applicable to livestock grazing especially where significant soil loss due to livestock grazing has occurred."
    - The Forest Service determined the design criteria related to this management measure is more applicable to timber sales.
- Soil Management Handbook FSH 2509.18: Appellant argues that the estimated number of acres (15,866) of soil potentially affected by the proposed action exceeds the 15% limit due to the definition of activity area.
    - According to the Hydrology, Soils, and Fisheries Specialist Report: WCPH direction states: "Manage land treatments to limit the sum of severely burned soil and detrimentally compacted, eroded and displaced soil to no more than 15% of any activity area." Applying this 15% to the activity area means 58,810 acres of soil

within the allotment boundaries would have to be detrimentally affected for the action alternatives to violate WCPH direction. Potentially affected soils in the project area allotments were estimated to be 15,866 acres. In addition to analyzing soils within the entire project area allotments soils were analyzed on non-forested acres within the allotment boundaries, approximately 30% of the total allotment acres. Detrimentally affected soils on non-forested acres within the project area allotments were estimated to be 433 acres 0.36% of the non-forested allotment acres. The analysis adequately demonstrates that the proposed project will not detrimentally affect more than 15% of the project area.

Conclusion: In each of the specific cases where the appellant contends Forest Plan direction was largely ignored, disregarded, or otherwise incorrectly implemented, the project record provides adequate evidence to the contrary. I also determined there was no violation of law, regulation, or policy, and recommend the District Ranger's decision be affirmed on this issue.

C) Fails to comply with Sensitive Species policy

Discussion: The appellant alleges that the Forest Service failed to comply with sensitive species policy by failing to determine and analyze viability, providing no management objectives for species recovery, and failing to incorporate best available science. Forest wide viability determinations for species listed as sensitive in 2005 are detailed in the Forest Plan FEIS, to which the Big 6 FEIS is tiered and which it incorporates by reference (Chapter 3, page 3-153). The FEIS (Chapter 3, page 3-192) also references the Forest Plan FEIS (appendix K and biodiversity/viability analysis in chapter 3), for which assessed impacts to the sensitive species, and completed viability determinations based on known and anticipated effects. Sensitive Species Policy does not require determining species viability. There are no other laws or regulations requiring analysis of species viability of a Sensitive Species. Rather, Sensitive Species policy requires that the Forest Service provides and maintains habitat which supports viable populations. The "objectives" required by the sensitive species policy are "objectives for managing populations and/or habitat" and are not "recovery objectives" which are only required for federally listed species under the Endangered Species Act.

The design criteria establish both implementation (short-term) and effectiveness (long-term) monitoring. As discussed in the RODs and FEIS, implementation monitoring will measure whether or not proposed actions and design criteria are being implemented as planned. Effectiveness monitoring will evaluate how effective management actions are in terms of moving toward or achieving desired conditions described in the FEIS (Chapter 2, Table 2-4 page 2-19; Table 2-7, pages 2-59 – 2-67; Appendix B), and informs adaptive management. In accordance with FSM 2672.41, the analysis in the Biological Evaluation determined that the project will not contribute to loss of viability of any native or desired non-native plant or animal species or trend toward Federal listing of any Sensitive Species. Refer to the discussion under appeal issue I.A regarding compliance with Sensitive Species policy.

Fails to incorporate best available science

In addition to multiple responses to comments regarding best available science on the DEIS, a review of the project record clearly indicates the Forest Service considered numerous scientific

sources of information when analyzing project effects, including all of the documents submitted by the appellant. The Bibliography appendix provides a list of the literature, papers, reports and other information used and cited during the analysis, including sources provided by the appellant, if applicable.

In the RODs, under the discussion regarding consistency with NFMA, the language is unambiguous as to how best available science was incorporated into the process and decision. This includes a "thorough review of relevant scientific information, a consideration of responsible opposing views, and the acknowledgement of incomplete or unavailable information, scientific uncertainty, and risk." In addition, "the best available science was used to develop design criteria, adaptive actions, and informed the effects analysis by professionals whom have managed the physical and biological resources on the forest and in the nearby area. This includes Forest Service and other state and federal agencies."

In the FEIS (Chapter 2), best available science is discussed in the context of how it was used by the ID team to develop desired conditions, and using emerging science for purposes of adaptive management. Chapter 2 of the FEIS specifically states:

> "New science and management techniques may be incorporated as needed or when they are developed."

In addition, Chapter 3 cites numerous discussions regarding the use of best available science within the effects analysis for each resource area. Lastly, review of the project record found ample evidence that the Wildlife Specialist Report, the Biological Evaluations prepared for bighorn sheep and all other Sensitive Species, the Risk Assessment, and all implemented Forest Plan standards and guidelines and species assessments considered best available science.

Bighorn Sheep

The appellant contends that a fundamental flaw in the NEPA process is the failure to incorporate best available science (BAS) in the management of bighorn sheep. The appellant claims that BAS requires at least a 9 mile buffer surrounding bighorn sheep use areas and habitats to reduce potential for disease transmission. The appellant also contends that the NEPA documents completely fail to discuss or implement the Payette Principles or the Payette Science Review or the 2 RMRS publications regarding bighorn sheep management.

Review of the project record shows that consideration of BAS is well documented in the Big 6 RODs, FEIS, Wildlife Specialist Report, Biological Evaluations and Bighorn Sheep Risk Assessment. The FEIS summarizes the analysis conducted in the Bighorn Sheep BE and Risk Assessment (Chapter 3, pages 3-208 – 3-214). Specifically, the FEIS references BAS by stating:

> "In response to internal and public comments on bighorn sheep, the Forest Service conducted additional analyses between the draft and final EIS for this project. A biological evaluation specific to bighorn sheep was prepared, including a risk assessment of potential contact between domestic and bighorn sheep. Best available science was considered in each of these documents and is incorporated by reference into the EIS. The risk assessment process examined the spatial and temporal proximity of domestic sheep to bighorn sheep and included relative ratings of risk of contact associated with each

allotment and bighorn sheep herd by project alternative. The biological evaluation considered the status of the bighorn sheep herds, the management direction in the forest plan and other laws and policy, and the findings of the risk assessment pertaining to the project alternatives, and made project determinations of effects. A summary of the findings from the biological evaluation and the risk assessment is presented in the *Summary of Findings* section following this discussion." (Chapter 3, bottom paragraph of page 3-208)

The bighorn sheep risk assessment, also found in the project record, has a substantial literature cited section which includes the following:

- The most recent species assessments.
- Literature on disease transmission between bighorn sheep and domestic sheep. The literature includes information on whether or not pneumonia has actually been transmitted between bighorn sheep and domestic sheep in wildland situations; however, the design criteria actions have the objective of separation assuming that disease can be transmitted.
- Recommendations from the Western Association of Fish and Wildlife Agencies.
- Literature and personal input from Wyoming Game and Fish Department biologists, and other agency biologists, who help manage local bighorn sheep.
- *Payette National Forest 2010 Supplemental Environmental Impact Statement and Forest Plan Amendment* identifying suitable rangeland for domestic sheep and goat grazing to maintain habitat for viable bighorn sheep populations.
- *Pagosa Ranger District 2010 Risk Assessment for the Pagosa Sheep Grazing Environmental Analysis* – An evaluation of risk of physical contact between domestic sheep and Rocky Mountain bighorn sheep in the Pagosa Sheep Grazing Analysis Area.

The best available science was used to develop design criteria, adaptive actions, and informed the effects analysis by professionals whom have managed the physical and biological resources on the forest and in the nearby area. This includes Forest Service and other state and federal agencies.

A review of the project record found a Statement of Inclusion of Scientific Review for the Big 6 Project and Bighorn Sheep. The Forest contacted the Payette National Forest regarding their GIS analysis for separation of bighorn and domestic sheep. Documentation of this conversation is found within the project record.

Based on a document found in the project record, a comparison of some aspects of the Payette National Forest sheep interaction analysis with the Bighorn National Forest Big 6 sheep interaction analysis was conducted, demonstrating that the Payette Principles were considered. In regard to BAS requiring a 9 mile buffer, this distance is not a firm buffer in Forest Service projects. The 9 mile buffer distance is a BLM requirement; whereas the Forest Service does a site-specific analysis of the likelihood of contact and disease transmission between domestic sheep and goats and wild sheep based on geographic features and timing of presence in an area.

This site specific analysis was conducted in the Bighorn Sheep Risk Assessment prepared in support of the Big 6 FEIS. As explained in the literature cited, the buffer distance is to be determined on a site-specific basis after considering such factors as topography and vegetation. This issue was addressed in the FEIS (pages 3-208 – 3-214), Bighorn Sheep Biological Evaluation, and Bighorn Sheep Risk Assessment. Based on review of the project record, it is apparent that the Forest drew upon the large body of sound science on bighorn sheep, including information from the Payette Principles, as discussed above.

Analysis for viability and development of management objectives of bighorn sheep is shown in both the FEIS (Chapter 3, pages 3-208 – 3-214), the bighorn sheep Biological Evaluation, and the Risk Assessment for bighorn sheep. These documents address bighorn sheep, analyze potential effects and develop design criteria to reduce the potential for contact and improve the likelihood of maintaining separation between bighorn and domestic sheep in the areas where Big 6 domestic sheep graze or trail (design criteria 19 – 26, applicable to the sheep and goat allotments; and Appendix A of the Risk Assessment). As described in the FEIS and BE,

> "...a population of bighorn sheep in Shell Canyon is estimated at between 10-15 individuals and is considered non-viable and unhealthy. There is also a population of bighorn sheep in the Devil Canyon area, primarily occupying BLM and private lands with some use on the forest. This herd is estimated at 160 animals and is considered healthy and viable."

The FEIS (Chapter 1, page 1-10) further states as a desired condition for bighorn sheep:

> "Maintain the viability of the Devils Canyon bighorn sheep herd. This herd occupies habitat on a portion of the forest. The forest plan strategy for sensitive species is to conserve populations by maintaining or improving habitat availability and quality when designing projects (forest plan chapter 1, objective 1b, strategy 2)."

As discussed above, a review of the record indicates that the Forest Service developed design criteria and adaptive management strategies (Medicine Wheel/Paintrock Sheep & Goat ROD pages 9-12; Powder River Sheep & Goat ROD pages 8-9) to maintain this desired condition. As stated in the RODs (found within the "Findings Required by Other Laws and Regulations" section of the RODs):

> "Rocky Mountain bighorn sheep were added to the regional sensitive species list after revision of the forest plan in 2005. This was documented as an administrative change to the forest plan March 3, 2010. In addition, the Devils Canyon herd was not recognized as either a viable population on the forest in the forest plan biological evaluation nor the wildlife specialist report for the forest plan FEIS; therefore, the biological evaluation prepared for the Big 6 project supplements the forest plan biological evaluation. Findings in this biological evaluation conclude that sufficient plan direction resides in the forest plan to provide for viability for the Devils Canyon herd; therefore, no amendment to the forest plan is necessary."

Review of the project record shows that implementation of the proposed action is combined with: monitoring and compliance with Forest Plan direction, implementation of design criteria and adaptive management strategies that apply across all sheep and goat allotments (Tensleep Project Area and Beaver Creek Project Area), and design criteria and adaptive management strategies implemented for the Beaver Creek Project Area specific to the Devils Canyon bighorn sheep herd. Based on our review of the project record, we determine that the design criteria and adaptive management strategies developed for those allotments near the Devils Canyon Herd would likely be effective in reducing the risk of contact with domestic sheep. Forest Service Manual direction for Sensitive Species states:

> "Maintain viable populations of all native and desired non-native wildlife, fish, and plant species in habitats distributed throughout their geographic range on National Forest System lands." (FSM 2670.22)

The project record documents that the Shell Canyon herd is not considered a viable population. Forest Service Manual policy states:

> "Avoid or minimize impacts to species whose viability has been identified as a concern." (FSM 2670.32)

As stated in the Bighorn Sheep Biological Evaluation prepared in support of the FEIS:

> "With bighorn sheep being widespread during pre-European settlement times, it is estimated that the non-forested portions of the Forest are potential habitat for the species, with the best potential habitat near any steeper, rocky canyons, particularly near the boundaries of the Forest, or higher in the Cloud Peak Wilderness." (Bighorn Sheep Biological Evaluation, pages 12 -13).

The Bighorn Forest Plan Revision Species Assessment for Bighorn Sheep states:

> "Foraging habitat, comprised largely of grass and forbs, is needed adjacent to adequate escape cover, which is comprised of steep, rocky terrain. Water from springs or streams or streams is also necessary within main use areas. There are many areas of this type of habitat on the Forest, though large tracts of the habitat are often interspersed with forested areas, which can become a barrier to sheep due to the lack of escape cover and higher predation rates." (Forest Plan Revision FEIS bighorn sheep species assessment, page 2)

As discussed in the Bighorn Sheep BE prepared in support of the Big 6 FEIS, a vegetation map provided in the Risk Assessment shows a widespread availability of shrub and grass vegetation types near the steep canyon faces along the perimeter of the Forest. The Risk Assessment indicates that potential habitat is distributed across the entire Forest, although there are potential barriers to bighorn sheep movements due to forested areas. Based on our interpretation of FSM 2670.12 and FSM 2670.22, and in regards to bighorn sheep, the Forest Service has a responsibility to manage habitats distributed throughout the geographic range within National Forest System lands to support viable populations, regardless of whether or not viable

populations currently exist. Thus, adaptive management strategies should be applied to all suitable habitats within the planning area that fall within the geographic range of all populations that occupy the Forest. Based on review of the project record, conservation strategies were developed throughout the range of both the Devils Canyon and Shell Canyon bighorn herds (Bighorn Sheep Risk Assessment, pages 35 and 39 – 50).

Based on our review of the project record, the Bighorn Sheep Risk Assessment, design criteria and adaptive management strategies and existing Forest Plan direction are adequate for maintaining population viability of the Devils Canyon bighorn herd, and considering future scenarios for the Shell Canyon bighorn herd:

> "Considering the direct, indirect, and cumulative effects, alternative 3 would not likely provide for conditions to establish a viable bighorn sheep herd in the Shell Canyon watershed in the foreseeable future." (FEIS, page 3-212)
>
> "Given the current status and distribution of the Devils Canyon (healthy, viable) and Shell Canyon (non-viable) bighorn herds, the existing Forest Plan guideline (rangeland vegetation #5) and Forest Plan standard (TES #3) provide necessary direction to managers to incorporate changed conditions as they become evident during the allotment management plan review schedule or as vacant allotments are identified. Bighorn sheep could expand onto the Forest in advance of either the allotment management plan review schedule or vacant allotment identification. However, the inclusion of the design criteria within the Big 6 project decision with alternative 3 that requires re-examining the Risk Assessment within 5 years or if changed conditions warrant, provides procedure for early detection necessary to trigger any other needed changes in domestic sheep management. Since the Risk Assessment identified 95% core herd use areas and 5% outer use areas which are most likely to have expansion from either herd, this measure is sufficient to provide managers and line officers the impetus to consider potential new conditions to protect bighorn sheep viability of the Devils Canyon herd, and thus provide viability for this species on the Forest, both in the short and long term." (Bighorn Sheep Biological Evaluation, pages 33 – 37)

The Bighorn Sheep Risk Assessment details a monitoring strategy associated with the Big 6 alternative 3. Specifically, the Risk Assessment states:

> "If bighorn sheep are detected, as described in the design criteria and adaptive management strategies, immediate measures will be taken to reduce risk of potential contact between domestic sheep and bighorn sheep. Monitoring efforts will be coordinated with WGFD, BLM, Medicine Wheel Paintrock Ranger District, Powder River Ranger District, and the Tongue Ranger District, due to bighorn sheep distribution across administrative boundaries, trailing of domestic sheep onto or through the Bighorn NF, and annual management of domestic sheep allotments. Additional population monitoring of the bighorn sheep may occur regardless of alternative by the WGFD and USFS. The WGFD, permittees, and Forest will annually review the monitoring strategy for coordination, effectiveness, population updates, habitat use changes, near-misses, and discuss conservation and multiple-use strategies. Additional surveys in each allotment

may occur on an annual basis to determine effectiveness of the measures implemented to reduce contact potential. Monitoring will continue as long as domestic sheep allotments remain active and/or bighorn sheep occupy adjacent habitat. (Bighorn Sheep Risk Assessment, page 35).

Lastly, the Bighorn Sheep Risk Assessment considers, in detail, a range of potential future scenarios and opportunities for changed management, to address possible changed conditions with the abundance, distribution, and viability of the Shell Canyon and Devils Canyon Bighorn sheep herds (Bighorn Sheep Risk Assessment, pages 40-50).

Conclusion: Based upon my review of the project record, I find that the FEIS and ROD did comply with the Sensitive Species policy, including consideration of best available science. I also determined there was no violation of law, regulation, or policy, and recommend the District Ranger's decision be affirmed on this issue.

We see no evidence of the Forest Service complying with 2670.46 - District Rangers, 2620.44 - Forest Supervisor, 2620.45 - District Ranger, 2621.2 - Determination of Conservation Strategies.

Discussion: In regards to FSM 2620.44, evaluating the cumulative effects of proposed management on habitat capability for wildlife and fish, including endangered, threatened and sensitive animal and plant species is the responsibility of the Forest Supervisor. As the analysis and resulting ROD was completed under the authority of the District Ranger, this direction is beyond both the authority of the Deciding Officer, as well as the scope of this project.

However, cumulative effects were analyzed and disclosed in Forest Plan FEIS Chapter 3 for both habitat as well as individual species. Chapter 3 of the FEIS for the Big 6 project also disclosed cumulative effects for each alternative to wildlife habitat and big horn sheep.

In regards to FSM 2620.45, refer to discussions on Appeal Issues I (A) and I (C) above.

In regards to FSM 2621.2, the Biological Evaluation (BE) for Bighorn Sheep, completed for the Big 6 project, as well as to supplement the Forest Plan BE, was prepared with the best available science (including the Risk Assessment) and serves as the conservation strategy for the Bighorn National Forest (BE, pg. 36).

Conclusion: Based upon my review of the project record, there was no violation of law, regulation, or policy, and recommend the District Ranger's decision be affirmed on this issue.

APPEAL ISSUE II: EA VIOLATES NEPA

Note: Appellant cites expired R4 interim directives (FSH 2209.13, Section 92.21 and 93.3 f).

The appellant contends that neither the EIS nor the ROD provides any rationale explaining why livestock grazing should be continued.

Discussion: In this appeal point the Appellant erroneously refers to the EIS as an EA. Decision rationale is contained in the ROD. The rationale is adequately covered, well written and clearly explains reasons for selecting an altemative which would continue livestock grazing. Rationale for continuing livestock grazing is also found in the FEIS on pages 1-3, 1-10, 1-12. , 1-13 and 1-14 of Chapter 1.

Conclusion: Based upon my review of the project record, I find that the FEIS and ROD did clearly explain the reasons for selecting an altemative which would continue livestock grazing. I also determined there was no violation of law, regulation, or policy, and recommend the District Ranger's decision be affirmed on this issue.

The appellant contends that EIS and RODs fail to provide any analysis or rationale why certain areas such as sensitive species habitats of big game winter range should not be grazed.

Discussion: Although this is not addressed in the ROD it is covered in the Chapters 1 and 2 of FEIS. Alternative 1 (p. 2-4) which is the no grazing altemative was analyzed in detail. Seven additional altematives were eliminated from a detailed analysis parts of many of these were included in other action altematives. Moreover, design criteria 12 (p. 2-54) was specifically prepared to avoid grazing in habitats of sensitive plants and animals through fencing and other protective measures when found on the landscape. Additionally, chapter 1 (p. 1-11 to 1-14) of the FEIS clearly indicates that this project is tiered to the Forest Plan which accounts for special management considerations in winter range (Mgt Area 5.41) and Plant and Other Wildlife habitat (Mgt. Area 5.4 and 3.5).The FEIS is tiered to the Forest Plan EIS which provides additional detail supporting continued activities under the conditions imposed in these management areas.

Conclusion: Based upon my review of the project record, I find that the FEIS and ROD did appropriately analyze and insure the protection of habitats for sensitive plants and big game winter range. I also determined there was no violation of law, regulation, or policy, and recommend the District Ranger's decision be affirmed on this issue.

The appellant contends that the decision violates NEPA and is arbitrary and capricious because it ignores the issue of 1) overstocking, 2) establishes a pre-decisional conclusion on permitted livestock numbers and seasons of use, and 3) lacks riparian condition data.

Discussion: This appears to be a complex assertion involving three working parts. It is addressed in the ordered specified above. The ROD clearly indicates that stocking rate will be set on the basis of applied management contingent upon meeting or moving toward desired conditions. Additionally, stocking rates will vary because of drought, fire, resource needs and forage availability. This is reiterated on p 13 of the rangeland vegetation specialist report – Goose Creek Criteria for suitability analysis for the Tongue RD allotments. A closer investigation from Appendix E shows that the season of use on the Little Hom C&H is reduced by 25 days with trigger points which would lead potentially to additional reductions, and planned reductions in use on the West Pass allotment. Selection of Altemative 3 actually reduces the number of

permitted AUMs based on the Social-Econ specialist report (p. 56). There are numerous references in the record which indicate that stocking rates may change as a result of monitoring connected with these decisions. These can be found on p. 2-66 to 2-67 of FEIS Chapter 2; and p. B-78, B207, & B-13 of FEIS appendix B. Decision makers were careful not to include alternatives which base stocking on capable acres only or at predetermined AUM levels as indicated on pages 2-68 and 2-69, Alternatives considered but not analyzed in detail. For findings related to riparian condition data see response in II F.

Conclusion: Based upon my review of the project record, I found no evidence in the FEIS or ROD that the decision was arbitrary or capricious or in violation of NEPA. The decision maker did not ignore overstocking problems or riparian conditions, nor did they rely on a pre-determined stocking rate. I also determined there was no violation of law, regulation, or policy, and recommend the District Ranger's decision be affirmed on this issue.

The appellant contends that regulations require that a suitability and capability determination be done for livestock grazing and MIS on a site specific basis. He argues that this was not done in the EIS.

Discussion: Suitability and capability determinations are Forest planning exercises as provided for in the regulation. A suitability analysis was completed for the Forest Plan in 2005 (Forest Plan ROD, p 16). A summary of the rangeland suitability is included in the Forest Plan FEIS, chapter 3. It is also addressed in Chapter 3 of the Forest Plan FEIS. Likewise, suitability and capability analyses are appropriately handled in the Forest Plan EIS appendix B including replacement pages B-31, B-32, B-37 and B-38. It is noted that the suitability analysis was reviewed and updated as needed for the Big 6 decision (Chapter 3, p. 3-104). Moreover it is noted that suitability and capability are addressed in Chapter 1 (p. 1-14) of the Big 6 FEIS. A project level suitability analysis is included in specialist reports for Little Horn and Goose and Goose Creek, Beaver, Rock Creek and Tensleep watersheds. These analyses include criteria for classification. Finally, a forage allocation write-up is provided in the rangeland vegetation specialist report of the Rock Creek and Tensleep areas. This report is an allocation of forage for other uses including a treatment of forage reserves and vacant allotments.

Conclusion: Suitability and capability analyses were completed at the Forest Plan level. A Forest level analysis was conducted for both in the 2005 revised Forest Plan. While there are no mandates to conduct capability and suitability analyses at the project level, an analysis was completed and capability was confirmed as was suitability. I determined there was no violation of law, regulation, or policy, and recommend the District Ranger's decision be affirmed on this issue.

A) The Appellant alleges that the EIS failed to analyze past actions specifically how past AMPs were implemented or how effective the actions that were proposed or how good permittee compliance has been.

Discussion: This point of appeal was raised in comments to the draft EIS and responses were provided in items 59 and 60. Chapter 1 of the FEIS indicates that district files were reviewed

with respect to this concern and have become part of the project record (p. 1-6). The EIS contains additional documentation concerning this issue. The record also contains a summary of current management for each allotment in the planning area in Table 2-2 of Chapter 2 (p. 2-6 to 2-16). The record contains information in Table 2-4 of Chapter 2 (p. 2-19 to 2-51) summarizing existing condition and the status of each benchmark by allotment. Past actions are analyzed in the effects section and documented in Table 3-1 of Chapter 3 (p. 3-9 to 3-10). Furthermore, the Forest is conducting an annual BMP reviews which assess the effects of management actions on selected allotments. These are conducted on a random basis and the record contains a summary of findings for those that have been completed. Most importantly it is noted that the affected environment section gives a detailed summary of past actions pertaining to each allotment (Chapter 3, p. 3-104 to 3-120). The record contains numerous other references in specialist's reports illustrating that more recent NEPA decision have been reviewed and the district files have been carefully reviewed to assess the effects of past actions including AMP implementation and compliance. It is also noted that adaptive management strategies were developed based on past monitoring and other factors and desired conditions were established in view of monitoring that had been completed as documented in the FEIS, Appendix B (p B-I and B-iii).

Conclusion: Based upon my review of the project record, I find that the FEIS and ROD did consider past actions in the analysis. I also determined there was no violation of law, regulation, or policy, and recommend the District Ranger's decision be affirmed on this issue.

B) The EIS failed to analyze impacts of actions

The appellant alleges that the FEIS fails to provide an honest and critical analysis of riparian conditions on the project area. Furthermore, the appellant contends that FEIS contains no rationale to support implementation of a 4 inch average stubble height for recovery purposes.

Discussion: The appeal point makes reference to GTR-INT-263 which was prepared as guidance for the managing grazing in the Intermountain Region (Region 4) of the Forest Service, U.S. Department of Agriculture. In the Rocky Mountain Region (Region 2) the standard used for managing riparian areas is outlined in the Watershed Conservation Practices Handbook (FSH 2509.25, Chapter 10, Section 12.1 (h)):

> "Manage dry meadow and upland plant communities, including Kentucky bluegrass types, that have invaded into wetland/riparian areas in a manner that will contribute to their replacement over time by more mesic native plant communities to the extent practicable. Develop site-specific riparian stubble height standards or use the following default levels for carex and juncos species: 3-4 inches in spring-use pastures and 4-6 inches in summer or autumn use pastures; to leave adequate residual stubble height to retain effective ground cover. Note: Clary and Webster (1989); USFS (1995); USFS (1996a). Riparian areas with no carex and juncos (for example bluegrass, tufted hairgrass, and so forth) require local stubble heights."

Following this standard is specified in design criteria 10 (p. 2-54). Moreover, the allowable stubble height to be used in riparian areas is within the range specified in the watershed

conservation handbook as indicated in design criteria 18 (p. 2-56). In fact for rangelands in unsatisfactory exceeds these standards for summer and autumn pastures with a stubble height of 7 inches.

Condition of riparian areas within the project area is a major issue which was tracked throughout the FEIS (see p S-3, 4 and 5). Chapter 1 of the FEIS contains numerous references to this issue. These references indicate that a majority (41 of 57, roughly 3-quarters) of riparian bench marks are currently meeting or moving toward desired conditions. Riparian vegetation is discussed extensively within the context of the proposed action in chapter 2 of FEIS. Current conditions are reported in Tables 2-2 and 2-4 Riparian monitoring is discussed in table 2-7 and effects of the alternative on riparian vegetation are summarized in table 2-9.

Current riparian conditions and direct, indirect and cumulative effects of the alternatives on riparian vegetation/condition are discussed extensively in the resource sections of chapter 3 in the FEIS. It is noted that Watershed Conservation Practices Handbook direction for riparian areas is included in FEIS Appendix C and as mentioned previously benchmarks sites and key are riparian area conditions as noted in Appendix B.

Conclusion: Based upon my review of the project record, I find that the FEIS and ROD did analyze riparian conditions and comply with WCPH 12.1(h) for stubble height. I also determined there was no violation of law, regulation, or policy, and recommend the District Ranger's decision be affirmed on this issue.

C) The appellant states that the EIS grossly misrepresents science and fails to implement best available science. The Forest Service failed to use or cite any of the research or analysis the appellant provided.

Discussion: See discussion to Appeal Issue I.C, *Fails to incorporate best available science*.

Conclusion: Based on review of the project record, I find the analysis did consider best available science. I also determined there was no violation of law, regulation, or policy, and recommend the District Ranger's decision be affirmed on this issue.

The appellant states that the EIS grossly misrepresents science and fails to implement best available science for the following:

- *"The EIS failed to determine what reference stream conditions are. Without this information WCPH 12.1i cannot be implemented."*
- *"The EIS and ROD do not prescribe soil compaction monitoring so the FS will never be able to implement WCPH 12.1j."*

Discussion: WCPH 12.1i: Do not allow livestock grazing through an entire growing season in pastures that contain in riparian areas and wetlands. This design criteria is included in the RODs, and is not related to reference stream condition. Current livestock grazing management (including season-long grazing) is summarized in FEIS chapter 2, Table 2-2. Current and

proposed livestock grazing management are summarized in table 2-4. More detailed, allotment-specific livestock grazing management is discussed by allotment in Appendix B Beaver, Appendix B Goose, and Appendix B Little Horn. To implement this design criteria, a grazing strategy suitable for the allotments with current season-long grazing systems was developed by the rangeland management specialist and included in the proposed action. Per review of these grazing strategies, any current season-long grazing systems have been addressed with appropriate adaptive strategy to identify issues in meeting or moving toward desired conditions. Implementation of this design criteria is not dependent on reference stream conditions.

WCPH 12.1j: Design grazing systems to limit utilization of woody species. This design criteria is included in the RODs, and is not related to soil compaction. A grazing strategy suitable for these allotments was developed by the rangeland management specialists and included in the proposed action. This strategy will limit the utilization of woody species. Implementation of this design criteria is not dependent on soil compaction monitoring.

Conclusion: Based on review of the project record, it is clear that implementation of these design criteria are not dependent on either reference stream conditions or soil compaction monitoring, as the appellant contends. I also determined there was no violation of law, regulation, or policy, and recommend the District Ranger's decision be affirmed on this issue.

D) Failed to complete viability assessments for any of the sensitive species, species of local concern or MIS. The EIS and BA/BEs determinations are insupportable.

Discussion: Refer to responses to issues I.A and I.C above for sensitive species, MIS, and overall viability approach.

As discussed in the wildlife section of the FEIS (Chapter 3, page 3-192), the forest plan FEIS (appendix K and biodiversity/viability analysis in chapter 3) assessed impacts to Sensitive Species, and completed viability determinations based on known and anticipated effects. This project tiers to and incorporates the FEIS analysis by reference, including viability determinations. Effects analysis for Local Concern Species are found in the FEIS (Chapter 3, pages 3-202 – 3-204), and in the Big 6 Wildlife Specialist Report (pages 6 – 8).

Forest Service Manual 2670.32 provides guidance for conducting appropriate inventories and monitoring of sensitive species to improve knowledge of distribution, status, and response to management activities, coordinating efforts within the Region and with other agency partners where feasible. The project record clearly indicates that the Forest collaborated with Wyoming Game and Fish Department in preparation of the Bighorn Sheep Biological Evaluation, Risk Assessment, and in development of design criteria and adaptive management strategies for the Devils Canyon Bighorn Sheep herd. Forest Service Manual 2672.43 provides procedures for conducting biological evaluations. There is no specific requirement for use of quantitative population data when completing viability determinations for Sensitive Species or non-MIS species (i.e., Species of Local Concern) (CEC v. Dombeck, 185 F.3d 1162 (10th Cir. 1999)). Further, there is not one methodology for determination of population viability that would be appropriate for all species or populations. The Biological Evaluations for Bighorn Sheep and Sensitive Species each incorporate information on species distribution and habitat suitability

within the project area, including the results of range-wide conservation assessments where available (i.e., Region 2 Species Conservation Assessments for Bighorn Sheep and Northern Leopard Frog). This information, combined with descriptions of existing conditions, habitat conditions expected with implementation of the project, incorporation of Forest Plan standards and guidelines, design criteria and adaptive management strategies, provide a rational basis for Sensitive Species viability determinations.

Conclusion: Based upon my review of the project record, I find that the FEIS and ROD did comply with Sensitive Species, Species of Local Concern, and MIS policy. In addition, the BA/BE were prepared consistent with policy. I also determined there was no violation of law, regulation, or policy, and recommend the District Ranger's decision be affirmed on this issue.

E) The appellant contends that the EIS failed to analyze actual forage use and this lack of disclosure is a violation of NEPA. He continues by stating that the FS is allowing far more AUMs to be removed than what is being permitted because of increased livestock weights.

Discussion: Unfortunately, the appellant did not raise concerns regarding actual forage use at a time when they could have been meaningfully addressed (e.g. scoping or formal comment period on the Draft EIS). The Forest Service agrees that, nationally, average cattle weights have increased over the years and thus a corresponding increase in forage consumption has occurred. Use is based on Forest Plan utilization guidelines which identify allowable use criteria. Any increase in consumption rates due to larger cattle is addressed at this point – so theoretically the allowable use guideline will be met sooner during the season of use with larger animals than with the same number of lighter animals. Over time, stocking rates can be adjusted, when needed, from the original stocking rates based on these guidelines, resource objectives, the need to meet other environmental and social concerns, as well as implementing changes in grazing management systems.

Several references in the record address this issue including items 67 and 93 in Appendix E; p. 2 of the Powder River Cow ROD (similar language is found in the other RODs); and p. 1-5 to 1-6, 2-16 to 2-18 and 2-65 to 2-67 of the FEIS. All indicate that stocking rates can potentially be adjusted based on monitoring to provide for meeting or moving toward desired conditions and meeting the needs of wildlife. The appellant erroneously states that the EIS did not provide for the needs of wildlife. Under the proposed alternative these too would have the opportunity to be met as surfaced thorough monitoring.

Conclusion: Based upon my review of the project record, I find that the FEIS and ROD did address stocking rates. I find no violation of law, regulation or policy, and recommend the District ranger be affirmed on this issue.

F) The EIS and RODs fails to justify range improvements.

The appellant contends that the EIS and RODs fail to demonstrate how range improvements would improve the health of the land, an assessment as to whether or not these improvements would be effective and a site specific analysis is lacking. Nothing in the record or in the design

criteria that specifically states that water developments are located more than a few hundred yards from water courses or streams.

Discussion: Justification for range improvements can be found in the purpose and need of chapter 1 and in RODs. The purpose of the project is to maintain or move rangeland conditions toward a desired condition. All RODs contain similar language. All RODs disclose findings which would maintain or improve vegetation conditions on the project area. Range improvements are designed to increase control and distribution of livestock as referenced in the FEIS p.3-128 to 3-129 and in specialist's reports. The potential effects of individual range structures or improvements on scenic integrity are addressed in table 2-6 (design criteria) in Chapter 2. The potential effects of the number, extent or density of range improvements are disclosed in Chapter 3 as direct, indirect, or cumulative effects by project area. Furthermore, specialist's reports have evaluated range improvements from the viewpoint of cumulative effects and within the context of Forest Plan guidelines. Specialist's reports also articulate the difference in impacts between alternatives 2 and 3. Design Criteria 3 (p. 2-54) does indicate that watering tanks and livestock handling facilities are not to be developed within the water influence zone. Maps of the proposed action were reviewed. These do not show proposed water developments near natural water courses. Water is available on the project area and the design criteria indicate that range improvement are intended to improvement the environment to the levels specified in the desired conditions.

Conclusion: Based upon my review of the project record, I find that the FEIS and ROD did analyze the need for and effects of range improvements. I also determined there was no violation of law, regulation, or policy, and recommend the District Ranger's decision be affirmed on this issue.

G) The EIS and ROD's fail to implement Adaptive Management

The appellant states the EIS and RODs fail to adequately address and implement adaptive management (FSH 2209.13 93.3g). The appellant contends that the decisions neither adequately justify the need for greater management flexibility, nor adequately define the adaptive management process.

Discussion:
Appellant quotes an R4 interim directive expired 11/23/2008. 36 CRF220.3defines adaptive management as: "A system of management practices based on clearly identified intended outcomes and monitoring to determine if management actions are meeting those outcomes; and, if not, to facilitate management changes that will best ensure that those outcomes are met or re-evaluated. Adaptive management stems from the recognition that knowledge about natural resource systems is sometimes uncertain.." 36 CFR 220.5(e)(2) provides, "The proposed action and one or more alternatives to the proposed action may include adaptive management. An adaptive management proposal or alternative must clearly identify the adjustment(s) that may be made when monitoring during project implementation indicates that the action is not having its intended effect, or is causing unintended and undesirable effects. The EIS must disclose not only the effect of the proposed action or alternative but also the effect of the adjustment. Such

proposal or alternative must also describe the monitoring that would take place to inform the responsible official during implementation whether the action is having its intended effect."

There is no specific law or regulation stating that adaptive management principles be utilized in livestock grazing NEPA. However, Region 2 has a white paper (Quimby, 2007) that outlines an adaptive process for livestock grazing NEPA. Quimby's document is not policy and is not binding. The Responsible Officials decided to follow an adaptive management strategy in the RODs.

Although Quimby's document is not policy and not binding and not specifically referenced in the project record, the RODs adopted an adaptive management strategy consistent with Quimby's suggestions. Multiple responses to comments regarding adaptive management on the DEIS explain or clarify adaptive management elements such as potential effect of strategies, triggers, and monitoring. In the RODs, the decisions clearly identify actions, adaptive management strategies, and monitoring for each allotment. FEIS Appendix B introduction provides an exhaustive description of how adaptive management strategies were developed; why there are differences in proposed actions, strategies, triggers, and monitoring between districts; how monitoring sites and protocols were selected; how desired conditions were established and will be used; and how monitoring will be used to evaluate movement toward desired conditions. In addition, FEIS Appendix B describes specific adaptive strategies and triggers by allotment and whether or not the projects are discretionary or mandatory.

The FEIS (Chapter 1) introduces the proposed action, and describes the principles of adaptive management. Chapter 2 provides an in-depth discussion of the proposed action and the elements of adaptive management as it applies specifically to the project, with information by allotment describing the differences between existing and desired conditions resulting in specific actions to be initially implemented, design criteria, and monitoring. Chapter 2 also provides a discussion of the fundamental premise of adaptive management in the link between key areas, benchmarks, desired conditions, and adaptive actions. Chapter 3 discusses adaptive management with respect to direct and indirect effects by resource.

Conclusion: Based on review of the record, the FEIS and ROD adequately address all elements of the adaptive management process. I also determined there was no violation of law, regulation, or policy, and recommend the District Ranger's decision be affirmed on this issue.

The appellant alleges that the EIS and RODs do not comply with a requirement that an interdisciplinary approach be used to identify the desired rangeland conditions within the analysis area and these conditions should be specific, quantifiable and focused on the rangeland resources.

Discussion: Each of the RODs indicates adaptive management is a means to an end which will enable a desired resource condition to be achieved. Desired conditions are summarized in Chapter 1 of the FEIS and specified in detail in Appendix B. Team meeting notes show that desired conditions were reviewed in an IDT meeting on 04/14/2009. These were also

addressed in smaller group meetings on 03/10/2009 and 04/24/2009. Desired conditions are very well defined, specific and focused in FEIS Appendix B. One example is on benchmark Lick Creek Meadow (Basin) C-3 of the Antelope Ridge S&G Allotment where basal vegetation would have a CFI > 2850; Feov, Dain, Carex (upland), and Agropyron combined with a CFI > 2670; Bare soil with a CFI < 244; and Yarrow, Pussytoes, Potentilla Combined with a CF < 2300.

Conclusion: Based upon my review of the project record, I find that the FEIS and ROD did meet all requirements with respect to this issue. The record shows interdisciplinary involvement in the development of desired conditions which are indeed specific, quantifiable and focused on the rangeland resources. I also determined there was no violation of law, regulation, or policy, and recommend the District Ranger's decision be affirmed on this issue.

The appellant contends that the EIS fails to define what an acceptable rate of movement toward desired conditions is.

Discussion: This issue was raised in the comments on the draft EIS. It was responded to by adding a section to Appendix B which describes how desired conditions were determined. Between the draft and final EIS Appendix B was added and it specifies how the desired conditions would be determined and what constitutes movement toward that condition (B-i to B-iii). Chapter 2 of the FEIS describes the link between key areas, benchmarks, desired condition and adaptive management actions (p 2-65 to 2-67). In this section it is made clear that desired conditions as based on professional judgment of the ID team and site specific monitoring is used to assess movement toward these conditions. Numerous are the examples throughout the record of trigger points complete with time frames which will be used to move lands toward desired conditions. A few may be viewed in Big Goose Allotment (Table B-4), The Lake Creek allotment (Table B-7) and Sunlight Mesa Allotment (Table\s B-21) as shown in Appendix B of the FEIS.

Conclusion: Based upon my review of the project record, I find that the FEIS and ROD did correct this issue between the draft and final EIS. I also determined there was no violation of law, regulation, or policy, and recommend the District Ranger's decision be affirmed on this issue.

The appellant asserts that current management and the adaptive management alternatives are basically the same and cause for undermining the alternatives that were analyzed. Virtually all of the actions listed under the adaptive management alternative have been available to the Forest Service for years or decades. The Forest Plan has been in effect for well over a decade. So the real difference between these alternatives is semantics. This violates NEPA."

Discussion: A detailed narrative in the FEIS (Chapter 2) describes a total of three alternatives considered, and seven alternatives considered but eliminated from detailed study and their rationale for elimination. Alternative 1 is the No Action/No Livestock Grazing alternative, Alternative 2 is the continuation of the current grazing levels and management, and Alternative 3 is the Proposed Action, Adaptive Management alternative. Table 2-9 in the FEIS is a comparison of alternatives by issue. There are numerous additional actions in Alternative 3 compared to

Alternative 2, including fences, water developments, stocking changes, allotment boundary changes, and vegetation treatments (burning) in the Little Horn and Beaver Creek project areas. Actions to be implemented immediately are summarized in FEIS Table 2-4 and discussed in detail in Appendix B. Adaptive management options under alternative 3 are presented in the Adaptive Strategies, Triggers and Actions tables in Appendix B. (See 40 C.F.R. §1502.14 and 36 C.F.R. § 220.5).

Conclusion: Based on review of the project record, the Forest Service considered and evaluated in detail substantially different alternatives appropriate to the purpose and need for this project. I also determined there was no violation of law, regulation, or policy, and recommend the District Ranger's decision be affirmed on this issue.

For the short or long-term monitoring we found no commitment, locations, triggers or measurable objectives.

Discussion: The RODs and FEIS discussed implementation and effectiveness monitoring. They both describe that implementation monitoring will measure whether or not the selected action and design criteria are implemented as planned, and effectiveness monitoring will evaluate how effective management actions are in terms of moving toward or achieving desired conditions, and informs adaptive management. In the ROD, the Deciding Official specifically recognizes the important role monitoring serves to successfully meet or move toward meeting desired conditions. From the ROD, "Linking effectiveness monitoring with implementation monitoring provides a basis for understanding the relationships between applied management and observed conditions and trends, and thereby allows opportunities for adaptation."

Conclusion: Based on the discussions in the FEIS and ROD, I find that the District Ranger understands the importance of monitoring for successful implementation of adaptive management, and is committed to monitoring. I also determined there was no violation of law, regulation, or policy, and recommend the District Ranger's decision be affirmed on this issue.

APPEAL ISSUE III – EIS AND ROD'S FAIL TO INSURE COMPLIANCE WITH CWA

The EIS and RODs make an erroneous and unsupportable assumption that if a stream is not on the state's 303d list that it is compliant with state water quality standards and is meeting all of its "beneficial uses". It also contradicts the FS's own data on adjacent watersheds, which found violations of state water standards despite the vigorous implementation of BMP's. The EIS failed to provide data supporting its claims that streams not listed on the 303d list are compliant with the CWA.

Discussion: The appellant is concerned that the FEIS and the ROD claim that streams not listed on the 303d list are compliant with the CWA. Unfortunately, the appellant did not raise this concern previous to this appeal so it could more meaningfully be addressed. However, no statements could be found in the FEIS or the ROD which make a claim that streams not listed on the 303d list are compliant with the CWA. The FEIS Chapter 3 and Hydrology, Soils and Fisheries Specialist Report both state that, "water quality in the project area meets the designated uses for the majority of the year, except for possible seasonal fluctuations in bacterial concentrations in some stream reaches during times of livestock grazing."

Conclusion: I determined there was no violation of law, regulation or policy, and recommend the District rangers be affirmed on this issue.

Assertion in the EIS that implementing BMPs will protect water quality and State water quality standards will be met is not supported by research or the FS own experience. The appellant cites four other scientific papers which the appellant claims are "opposing views". The EIS fails to acknowledge and address these "responsible opposing views regarding the effectiveness of BMPs".

Discussion: Under the nonpoint source pollution provisions of the CWA (Section 319), States develop a management program for nonpoint pollution control, which is voluntary and not regulated by permits. This was done with State-developed BMPs. Region 2 has developed Water Conservation Practices (WCPs) to meet State non-point source water quality requirements (Hydrology, Soils and Fisheries Specialist Report, pg. 4). Agency direction in the Watershed Conservation Practices Handbook states, "Best Management Practices are, by definition, the most effective, practicable means of preventing or reducing the amount of pollution generated by nonpoint sources to a level compatible with water quality goals. (FSH 2509.25, Chapter 10, pg 5).

The appellant provided the following comment to the Draft EIS: "...the Forest Service ignores its own water quality data collected over a 5 or 6 year period within the North Tongue area clearly showing that the MPs are ineffective at meeting state water quality standards and instead uses "riparian vegetation condition as a surrogate" which it knows is ineffective." (FEIS, Appendix E, pg E-42). The subsequent response, in part, was provided: "Streams on the forest are monitored for best management practices (BMP) implementation and effectiveness, following forest plan direction. This is consistent with recent court rulings in the District Court of Wyoming and the subsequent appeals ruling, where BMP implementation and monitoring meet the Wyoming water quality laws."

In addition, the Hydrology, Soils and Fisheries Specialist Report includes a review of BMPs on the affected allotments in the Big 6 Project. The determination of this review was, "overall the application of BMPs in conjunction with the implementation of Bighorn National Forest Vegetation Grazing Guidelines 2007 by each District provides adequate protection for designated uses and enables interdisciplinary teams to identify opportunities for soil and watershed improvements." (pg 12). This is also found in the FEIS (pg. 3-47). In addition, the ROD specifies that water resources will be maintained or improved through implementation of BMPs and Water Conservation Practices Handbook direction included in the design criteria and a finding that each Decision is consistent with the CWA.

Unfortunately, the appellant did not raise or provide the referenced "opposing views" at a time when they could have been meaningfully addressed (e.g. scoping or formal comment period on the Draft EIS). However, that the Appellant subjectively feels the cited appeal documents are "opposing views," is legally irrelevant. In *Lands Council v. McNair (No. 09-36026)* the court found, ""When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Lands Council*, 537 F.3d at 1000 (quoting *Marsh*, 490 U.S. at 378). It is within the Forest Service's discretion to rely on its own data and to discount

the alternative evidence proffered by Lands Council." See, *Lands Council v. McNair, 20675, 20687, No. 09-36026,* (9th Circuit, December 28, 2010).

Conclusion: I determined there was no violation of law, regulation or policy, and recommend the District rangers be affirmed on this issue.

The NEPA Process failed to discuss in any way the antidegradation requirements of the Clean Water Act.

Discussion: Each State must develop, adopt, and retain a statewide antidegradation policy regarding water quality standards and establish procedures for its implementation through the water quality management process. The Wyoming Department of Environmental Quality has developed an Antidegradation Implementation Policy. This policy states:

> B. Nonpoint Sources.
>
> Nonpoint sources of pollution are not regulated by permits issued by the Department, but are controlled by the voluntary application of cost effective and reasonable best management practices. For Class 1 waters, best management practices will maintain existing quality and water uses. (Wyoming Surface Water Quality Standards, pg. 9).

See response to Issue III.B above regarding the use of BMPs to meet State Water Quality Standards.

Conclusion: I determined there was no violation of law, regulation or policy, and recommend the District rangers be affirmed on this issue.

WE ALSO INCORPORATE BY REFERENCE OUR ORIGINAL COMMENTS ON THE EIS AS SPECIFIC APPEAL POINTS AS THEY WERE NOT ADEQUATELY ADDRESSED IN THE FEIS.

Discussion: 36 CFR 215.14(a) places the burden on the Appellant to provide specific project or activity specific evidence and rationale focusing on the decision, to show why the decision should be reversed. The Appellant attempts to, without specificity, switch this mandatory burden to the Responsible Official by attempting to globally incorporate pre-decisional comments as post decisional appeal points. 36 CFR 215.14(b) (6) through (9) contain essential substantive elements of a post-decisional appeal which must be met by the Appellant, none of which are satisfied by merely asking the Appeal Deciding Officer (ADO) to incorporate pre-decisional comments as post decision appeal points. Specifically, 36 CFR 215 (b) (8) requires the Appellant to provide information on why the Responsible Official's decision failed to consider substantive comments. Merely requesting the ADO to respond to these very same comments as appeal points does not meet this required element. The Appellant, therefore, has not met his burden under 36 CFR 215.14 (a).

Conclusion: Based on the above discussion, I decline to address the comments to the EIS as appeal points because, as presented, they do not provide sufficient information for the ADO to render a decision and are not in compliance with the appeal content requirements of the regulations.

RECOMMENDATION

After review of all appeal points and the record, I recommend the Decision of the District Ranger be affirmed.

RHONDA O'BYRNE
District Ranger

cc:
* *(Include address)*